89-299

No. _____

Supreme Court, U.S.
FILED
AUG 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES W. KEMPE, JR. and MICHAEL J. ARNOLD, in their capacity as Joint Liquidators of Mentor Insurance Limited,

Petitioners,

—v.—

OCEAN DRILLING & EXPLORATION COMPANY, *et al.*,

Respondents,

and

PINNACLE REINSURANCE COMPANY LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Under what circumstances, if any, does a District Court through the procedural mechanism of a *forum non conveniens* dismissal have the power to destroy a private cause of action brought pursuant to the special venue provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) ("RICO")?

II. Assuming *arguendo* such a power exists, is it abused when federal RICO claims are destroyed by a *forum* dismissal, (i) without any attempt to weigh the importance and materiality of the trial evidence alleged to be unavailable if the case were tried in the federal court, (ii) in the absence of any finding that the various private and public interest factors weigh heavily in support of dismissal, (iii) by expressly refusing to consider that the existence of the federal RICO claims created a federal interest in retaining the case?

III. Under the circumstances present here, did the District Court through the procedural mechanism of a *forum non conveniens* dismissal have the power to destroy the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Charles W. Kempe, Jr. and Michael J. Arnold in their capacity as Joint Liquidators of Mentor Insurance Limited and the respondents Ocean Drilling & Exploration Company, Mentor Holding Corporation, Pinnacle Reinsurance Company Limited, Mary Colson as sole heir and administratrix of the estate of William L. Colson (deceased), Clovis H. Steib, Ronald W. Herman, Odie F. Vaughn, James L. Kilpatrick, Hugh J. Kelly, Herman S. Kelly and J. Douglas Higley. The same parties are before this Court.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL STATUTE INVOLVED	2
STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION	2
REASONS FOR GRANTING THE WRIT	5
I. This Court In An Exercise of Its Supervisory Role Should Define the Extent of a District Court's Jurisdiction to Procedurally Destroy Federal RICO Substantive Rights Through a *Forum Non Conveniens* Dismissal	5
A. At Issue is the Extent of a Federal Court's Discretionary Power to Ignore a Congressional Mandate	6
B. *Forum Non Conveniens* Has No Application in the Analogous Context of the Antitrust Laws	6
C. Similar RICO Jurisdictional Issues Are Now Before This Court	8
D. The Decision Below is Apparently Inconsistent with Decisions of This Court	9

PAGE

E. In the Interests of Other Litigants and the Lower Courts, the Issue Should be Resolved Now 10

II. This Court Should Decide If the *Forum* Doctrine May be Employed to Destroy a Constitutional Right to a Jury Trial..... 11

CONCLUSION 13

APPENDIX (Opinion and Judgment of Court of Appeals, Order Denying Rehearing *En Banc*, Memorandum Decision of District Court, and Pertinent Portions of 18 U.S.C. § 1961 *et seq.* (1982))..... A-1, B-1, C-1, D-1

TABLE OF AUTHORITIES

Cases:	PAGE
Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) ..	6
Baltimore & Ohio Railroad Co. v. Kepner, 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (1941)	7
Beacon Theaters v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)	11
Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)	6, 9
H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 57 U.S.L.W. 4951 (June 26, 1989, No. 87-1252)	9, 10
In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199, 98 L. Ed. 2d 150 (1987)	11
Kempe v. Ocean Drilling & Exploration Co., 683 F. Supp. 1064 (E.D. La. 1988)	2, 4
Kempe v. Ocean Drilling & Exploration Co., No. 88-3763 (5th Cir. 1989)	4, 5
Miles v. Illinois C.R. Co., 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129 (1942)	7
Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)	12
Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982)	12
Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)	11

PAGE

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) 6, 9, 10

Tafflin v. Levitt, 865 F.2d 595 (4th Cir.), *cert. granted*, 109 S. Ct. 2428, 104 L. Ed. 2d 985, 57 U.S.L.W. 3779 (1989) 8

Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127 (2d Cir. 1987) 7

United States v. National City Lines, Inc., 334 U.S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584 (1948) 7

United States v. Turkette, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) 10

Van Cauwenberghe v. Biard, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988) 9

Constitution and Statutes:

U.S. Constitution, Amendment VII ..... i, 11

U.S. Constitution, art. III, § 2 5

15 U.S.C. § 15(a) (1982) 8

15 U.S.C. § 22 (1982) 8

18 U.S.C. § 1961 *et seq.* (1982) ..... i, iv, 2

18 U.S.C. § 1965(a) (1982) 8

18 U.S.C. § 1965(c) (1982) 4

28 U.S.C. § 1254(1) (1982) 2

28 U.S.C. § 1404 (1982) 7

Rules:

Fed. R. Civ. P. 38(a) 11

PAGE

Periodicals and Publications:

Baucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947)..... 6

RICO Legislative History:

116 Cong. Rec. 35191, 35193, 35197, 35200, 35215, 35216, 35295, 35313, 35319, 35321, 35328 (1970) 6

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970) ... 8

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CHARLES W. KEMPE, JR. and MICHAEL J. ARNOLD, in their capacity as Joint Liquidators of Mentor Insurance Limited,

Petitioners,

—v.—

OCEAN DRILLING & EXPLORATION COMPANY, *et al.*,

Respondents,

and

PINNACLE REINSURANCE COMPANY LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Charles W. Kempe, Jr. and Michael J. Arnold respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 23, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, not yet reported, is reprinted as Appendix A, *infra*. The unreported order of the Fifth Circuit denying petitioners' motion for Rehearing *En Banc* is reprinted as Appendix B, *infra*. The memorandum decision of the United States District Court for

the Eastern District of Louisiana (Livaudais, D.J.) is reported at 683 F. Supp. 1064 (E.D. La. 1988). It is reprinted in Appendix C, *infra*.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 23, 1989. (A-1). A request for *en banc* review was denied on July 24, 1989. (B-1). This Court has jurisdiction to review the issue presented herein by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982). Pertinent portions are reprinted in Appendix D, *infra*.

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION

In this case federal RICO claims were destroyed by a *forum non conveniens* dismissal in favor of a foreign jurisdiction, the British colony of Bermuda. Bermuda does not recognize and will not enforce those federal claims. The Constitutional right to have those claims, as well as the pendent claims involved, heard by a jury was also extinguished since a jury trial as a matter of right does not exist in Bermuda.

The Petitioners, plaintiffs below, are the Court-appointed Liquidators of Mentor Insurance Limited ("Mentor") which is in liquidation in Bermuda. When Mentor was an operating company, it wrote an enormous amount of insurance business in the United States. Although the Petitioners are aliens, the economic interests they ultimately seek to vindicate are those of

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1 Citations to the paginated appendices will be styled "A _____."

Mentor's creditors, insureds and reinsureds, who are overwhelmingly Americans located throughout the United States. Creditors' claims in the liquidation proceedings exceed $800 million.

The Respondents, defendants below, consist of (i) Mentor's corporate parents, Ocean Drilling & Exploration Company and Mentor Holding Corporation, both Delaware Corporations based in New Orleans, Louisiana, (ii) certain members of their management, all Louisiana residents, and (iii) Pinnacle Reinsurance Company Limited, a Bermuda Corporation.

The action was brought in the United States District Court for the Eastern District of Louisiana, the residence of ten of the eleven Respondents. Federal jurisdiction was premised on RICO.[1] The Amended Complaint also asserted pendent counts sounding in tort. A jury trial was timely demanded. The Eastern District of Louisiana was the only court which had personal jurisdiction over all of the Respondents and subject matter jurisdiction over all of the claims asserted.

The Amended Complaint charged that the Respondents violated RICO by concocting in Louisiana and carrying out from Louisiana a scheme to falsify the publicly disseminated financial statements of Mentor from 1982 through March 1985. The method of the dissemination of those financial statements was the use of the United States mails throughout the United States in large part from Louisiana. As a result of the fraudulent scheme, the bankrupt Mentor was damaged in an amount now estimated to be $200 million, an amount which a successful RICO judgment would have trebled.

Seventeen months after commencement of the action all Respondents moved for *forum non conveniens* dismissal. This motion was made notwithstanding the fact that New Orleans was the home forum of all the Respondents save one. If successful, they volunteered to the District Court to submit to personal jurisdiction in Bermuda and to appear as witnesses at trial in Bermuda. In their briefs in support of the motion, they claimed

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1 Diversity was lacking because of the presence of one alien defendant.

to need the trial testimony of certain individuals who resided in Bermuda, and certain documents located there.

The motion was granted, *Kempe v. Ocean Drilling & Exploration Co.*, 683 F. Supp. 1064 (E.D. La. 1988), in large part because of what the District Court perceived to be the "drain on the court's time and energy" presented by the case (*id.* at 1070) (C-12). According to the Opinion of the District Court, the *forum non conveniens* doctrine applies across the board to all federal actions regardless of their jurisdictional bases (*id.* at 1067) (C-6), and, inferentially, even if the grant of a *forum* motion resulted in the destruction of the very federal claims which created jurisdiction in the Court to begin with.

In purporting to balance the respective public interest factors, the District Court expressly refused to consider that a granting of the motion meant the destruction of the federal claims involved (*id.* at 1071) (C-13). It made no attempt to weigh the importance or materiality of the alleged unavailable evidence, or for that matter its actual unavailability. Rather, it merely added up what it characterized as "hypothetical witnesses" who resided in Bermuda, and concluded that this "hypothetical list" outnumbered the number of witnesses residing in Louisiana absent the Respondents themselves and their employees. (*id.* at 1069) (C-10). In addition to not considering the Respondents and their employees in the process of comparing the number of "hypothetical witnesses" here and abroad, the District Court ignored the large number of American witnesses outside the State of Louisiana (*id.*) (C-10), witnesses subject to the subpoena power of the Court (18 U.S.C. § 1965(c)). It did not find, and on this record could not find, that the balancing of the competing private and public interest factors weighed heavily in favor of dismissal.

The Fifth Circuit affirmed. In essence, it held that a dismissal and resulting destruction of a RICO action on *forum non conveniens* grounds is an appropriate exercise of discretion when the plaintiff will not be deprived of "any remedy" in the foreign forum (A-13). Here, according to the rationale of the Fifth Circuit, since the Petitioners also had pendent claims, some or

all of which could be heard in Bermuda, the destruction of their federal RICO claims would not deprive them of "any remedy" abroad and therefore the District Court's exercise of its discretion would not be disturbed (A-13).

The Fifth Circuit in this case also rejected the contention that a *forum non conveniens* destruction of the RICO claims would be contrary to the national RICO enforcement policies intended by Congress when it enacted the statute by observing that those policies were directed at members of "organized crime" (A-10, A-11), a status not enjoyed by the Respondents.

REASONS FOR GRANTING THE WRIT

I.

This Court in an Exercise of Its Supervisory Role Should Define the Extent of a District Court's Jurisdiction to Procedurally Destroy Federal RICO Substantive Rights Through a *Forum Non Conveniens* Dismissal

The RICO statute, and its special venue provision, grants to the victim of the conduct it proscribes a *right* to seek treble damages in federal court. The import of the Fifth Circuit's Opinion, however, is that regardless of what the RICO legislation and its special venue provision provide the right of a treble damage federal cause of action may be withdrawn at the discretion of a District Court if some other foreign remedy exists abroad. That the conduct complained of was committed in the United States by Americans to the ultimate detriment of other Americans in violation of American law is immaterial.

Thus, the issues this case presents go to the heart of the discretionary powers, or jurisdiction, of a District Court under Article 3, Section 2 of the United States Constitution, and the exercise of those powers in apparent contravention of an Act of Congress.

A. At Issue is the Extent of a Federal Court's Discretionary Power to Ignore a Congressional Mandate

In creating a federal right to pursue a treble damage recovery in federal court, the RICO legislation had a much broader purpose than merely defining the rights and obligations of individual litigants. RICO is an effort to set forth a national policy to deal with a national threat to the commerce of the United States. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498, 105 S. Ct. 3275, 3287-88, 87 L. Ed. 2d 346, 350 (1985). Private treble damage actions under the RICO statute are an integral part of Congress' RICO enforcement scheme. 473 U.S. at 493-94, 105 S. Ct. at 3283, 87 L. Ed. 2d at 357; *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151, 107 S. Ct. 2759, 2764, 97 L. Ed. 2d 121, 130 (1987); 116 Cong. Rec. 35191, 35193, 35197, 35200, 35215, 35216, 35295, 35313, 35319, 35321, 35328 (1970).

Where a foreign court will not carry out that national policy, a *forum* dismissal in favor of such a foreign forum destroys the statutory purpose and the remedial measures created by Congress to effectuate that purpose. This is the case regardless of what remedies, if any, are available in the foreign forum. Whether a District Court has such jurisdictional power is a highy important federal question which should be addressed and determined by this Court.

B. *Forum Non Conveniens* Has No Application in the Analogous Context of the Antitrust Laws

Historically, the power to dismiss on *forum non conveniens* grounds had been limited to cases in admiralty or equity where jurisdiction in general was traditionally discretionary. *See*, Baucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 925 (1947). In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947) ("*Gilbert*"), this Court approved a dismissal on *forum* grounds in an action at law, Justices Black and Rutledge dissenting on that ground. However, *Gilbert* was concerned with a diversity case in which venue was based on the general venue statute. Still to be directly addressed was whether

the *forum* dismissal doctrine would apply to causes of action created by federal statutes which, like RICO, contain special venue provisions as a matter of right. Before *Gilbert*, this Court had held that a *forum non conveniens* dismissal was inapplicable to such an action. *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 54, 62 S. Ct. 6, 10, 86 L. Ed. 28, 33-34 (1941) ("A privilege of venue, granted by the legislative body which created the right of action, cannot be frustrated for reasons of convenience or expense"). *See also*, *Miles v. Illinois C.R. Co.*, 315 U.S. 698, 701, 62 S. Ct. 827, 829, 86 L. Ed. 1129, 1132 (1942).[3]

A year after *Gilbert*, in *United States v. National City Lines, Inc.*, 334 U.S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584 (1948) ("*National City Lines*"), this Court resolved that issue. *National City Lines* presented the issue of whether the *forum* doctrine applied to an antitrust suit which the defendants were attempting to have transferred from the Southern District of California to the Northern District of Illinois. The case was decided before the enactment of 28 U.S.C. § 1404 (1982). As such, at the time, the *forum* dismissal doctrine applied to cases where the proposed transferee forum was either domestic or foreign. In reversing the dismissal, this Court held that since the special venue provisions of the Clayton Act were a matter of right, the District Courts had no power to apply *forum non conveniens* to such lawsuits. 334 U.S. at 596-97. As this Court stated:

> Whatever may be the scope of its previous application or of its appropriate extension, the doctrine . . . [*forum non conveniens*] . . . is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to

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3 The only other Circuit decision to address the issue in a RICO context was the Second Circuit's opinion in *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987). However, in that case, the plaintiff apparently had failed to state a valid RICO claim. 811 F.2d at 129; 640 F. Supp. 1211, 1213-14 (S.D.N.Y. 1986).

> hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. (*Id.*)

RICO's special venue provisions were adopted from the antitrust laws. The RICO and antitrust provisions are almost identical. *Compare* 18 U.S.C § 1965(a)(1982) (a civil action "may be instituted" in the district court of any district in which the defendant "resides, is found, has an agent, or transacts his affairs") *with* 15 U.S.C. § 15(a) (1982) (an antitrust plaintiff may bring suit "in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . .") *and* 15 U.S.C. § 22 (1982) ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business"); *see* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970). Both enactments look to and rely on the federal judicial system to carry out and effectuate their respective national policies. Thus, if a District Court does not have the power to dismiss antitrust claims on *forum* grounds, by what right does it assume the power to dismiss RICO claims on that procedural ground? This is particularly the case where, as here, and unlike in *National City Lines*, the effect of the dismissal is the destruction of those federal claims.

C. Similar RICO Jurisdictional Issues Are Now Before This Court

On May 30, 1989, this Court granted certiorari in the case of *Tafflin v. Levitt*, 865 F.2d 595 (4th Cir. 1989), to consider, *inter alia*, whether a District Court may abstain from hearing a federal RICO case in favor of a State Court. *See* 109 S. Ct. 2428, 104 L. Ed. 2d 985, 57 U.S.L.W. 3779 (1989). In determining that issue, this Court will of necessity consider the intent of Congress concerning the role of the federal judicial system in enforcing the policies of the RICO legislation, and whether a

District Court has the discretionary power to refuse to hear such a case. These same issues are involved in this case. Indeed, here they are more dramatically raised. In *Tafflin*, the dismissal did not have the effect of the destruction of the federal claim which the District Court in that case intended would be heard by the State Court to which it deferred. 865 F.2d at 599-600. Here, in sharp contrast, the discretionary dismissal terminated those federal claims.

D. The Decision Below is Apparently Inconsistent with Decisions of this Court

The decision below appears to be inconsistent with the principles of prior and subsequent decisions of this Court, in particular *National City Lines, supra.* Moreover, the Fifth Circuit's refusal here to enforce the national policies of the RICO Act, in part, because the defendants are not members of "organized crime" appears to be inconsistent with this Court's more recent holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2905, 57 U.S.L.W. 4951, 4955 (June 26, 1989, No. 87-1252). It is also inconsistent with prior holdings of this Court to the same effect. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, 499, 105 S. Ct. 3275, 3284, 3286, 87 L. Ed. 2d 346, 359, 360 (1985) ("Section 1962 in turn makes it unlawful for 'any person'—not just mobsters—to use money derived from a pattern of racketeering activity . . .").

The decision below further ignores this Court's holding in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, 1062 (1947), that the *forum* doctrine is to be employed only in the "rare" and "exceptional" case, and that the balancing of interests must be "strongly in favor" of dismissal before a plaintiff's choice of *forum* is disturbed, a fact which neither the Fifth Circuit nor the District Court found. It also runs afoul of this Court's recent holding in *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988), that a District Court in deciding a *forum* motion should "determine whether the pieces of evidence cited by the parties are critical, or even relevant . . . ." 108 S. Ct. at 1953, 100 L. Ed. 2d at

528-29. Despite the destruction of the federal RICO claims involved, here no such attempt was made (*see* p. 4, *supra*).

E. In the Interests of Other Litigants and the Lower Courts, the Issue Should be Resolved Now

As this Court is well aware, RICO has not exactly been greeted by the lower courts with open arms. This negative judicial reaction has manifested itself in various judge-made road blocks on the ability to pursue RICO actions, restrictions not intended by Congress nor contained in the statute itself. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 57 U.S.L.W. 4951 (June 26, 1989, No. 87-1252) (rejecting multiple scheme requirement and rejecting organized crime nexus requirement); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (rejecting prior conviction requirement and rejecting racketeering injury requirement); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (rejecting legitimate enterprise requirement).

This case represents the latest manifestation of this phenomenon. Unless this Court resolves the issue one way or the other, pending and future RICO cases involving some international connection undoubtedly will be met by *forum non conveniens* dismissal requests, knee jerk or otherwise. The lure of the effect of a successful *forum* motion, *i.e.*, elimination of the RICO claim and its treble damage recovery regardless of its merit, virtually guarantees such repeated use. These motions, in turn, will be decided upon the now leading authority in the area, the decision of the Fifth Circuit in this action, a decision which Petitioners respectfully submit is simply incorrect.

II.

This Court Should Decide if the *Forum* Doctrine May be Employed to Destroy a Constitutional Right to a Jury Trial

The Seventh Amendment to the United States Constitution provides in unambiguous terms:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury *shall be preserved* . . . ." (emphasis added)

This Constitutional mandate has been implemented by Rule 38(a) of the Federal Rules of Civil Procedure which provides that the Seventh Amendment right to a jury trial "shall be preserved to the parties inviolate." As this Court held in *Beacon Theaters v. Westover*, 359 U.S. 500, 508, 79 S. Ct. 948, 955, 3 L. Ed. 2d 988, 996 (1959), a District Court cannot through a purported exercise of discretion destroy that right. Where that right is at stake, discretion must yield.

To the extent, if any, the District Court had any discretionary power to dismiss this case, that discretionary power should have yielded to the plaintiff's right to a jury trial. This is not a case with only a tangential connection to the United States. This case involved violations of federal law based on conduct committed in the United States by Americans to the ultimate detriment of Americans.

No doubt because historically the doctrine of *forum non conveniens* was applicable in cases in equity where no right of a jury trial existed (*see* p. 6, *supra*), this basic Constitutional issue has never been addressed by this Court, nor to our knowledge by any of the Circuit Courts of Appeal, albeit various Courts have observed that a lack of a jury trial in a foreign forum does not render that forum unfair for purposes of a *forum non conveniens* analysis. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18, 102 S. Ct. 252, 264 n.18, 70 L. Ed. 2d 419, 433 n.18 (1981); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 851 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 108 S. Ct. 199, 98 L. Ed. 2d 150 (1987).

While the issue was not raised below, because of its Constitutional importance and its pure legal nature the issue should nevertheless be considered by this Court. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817, 86 L. Ed. 2d 411, 427-28 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23, 102 S. Ct. 2690, 2698 n.23, 73 L. Ed. 2d 349, 359 n.23 (1982).

CONCLUSION

This case raises important federal jurisdictional and procedural issues warranting an exercise of this Court's federal judicial supervisory role. It presents in sharp focus the issue of the extent of a District Court's procedural powers under the Constitution to destroy federal substantive rights created by Congress, as well as the Constitutional right to a jury trial. Lastly, in a number of respects the decision of the Fifth Circuit appears to be contrary to principles set forth in the decisions of this Court referred to above.

For all of these reasons, this Court should issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit to review the questions presented.

Dated: August 18, 1989

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3763

June 23, 1989

Charles W. KEMPE, Jr. and Michael J. Arnold, in Their Capacity as Joint Liquidators of Mentor Insurance Limited,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

OCEAN DRILLING & EXPLORATION COMPANY, et al.,

Defendants-Appellees,

—and—

Pinnacle Reinsurance Company, Limited,

Defendant-Appellee-Cross-Appellant.

Joint liquidators appointed to wind up the affairs of an insolvent insurer in Bermuda brought suit against the insurer's parent corporation and a reinsurer. The United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., 683 F.Supp. 1064, granted a motion to dismiss on forum nonconveniens grounds. Appeal and cross appeal were taken. The Court of Appeals, Aldisert, Circuit Judge, sitting by designation, held that: (1) the fact that a Racketeer Influenced and Corrupt Organizations Act claim would not be recognized in Bermuda did not prevent the application of the forum non conveniens doctrine; (2) courts in Bermuda would provide an ade-

quate remedy, even without the RICO claim; and (3) the private interest factors involving the litigants and public interest factors favored resolution of the dispute in Bermuda, rather than in Louisiana.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before ALDISERT*, REAVLEY and HIGGINBOTHAM, *Circuit Judges.*

ALDISERT, *Circuit Judge.*

The major question for decision is whether a count alleging a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, (RICO) immunizes a civil complaint from the doctrine of *forum non conveniens.* Should we decide there is no immunity, we are then required to determine whether the district court abused its discretion in concluding that Bermuda was the proper forum for this case after analyzing the private interest factors affecting the litigants' convenience and the public interest factors affecting the forum's convenience as set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) and re-affirmed in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). We conclude that the civil RICO complaint at issue here is not immune from the application of the doctrine and that the district court did not abuse its discretion in applying the doctrine.

I.

Charles W. Kempe, Jr., and Michael J. Arnold, plaintiffs below, prosecute this appeal as joint liquidators appointed by

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* Circuit Judge of the Third Circuit, sitting by designation.

the Bermuda Supreme Court to wind up the affairs of bankrupt Mentor Insurance Limited (Mentor), a company organized by special act of the Bermuda Parliament and located throughout its existence in Bermuda. Kempe is a Bermudian and a principal partner in one of Bermuda's largest accounting firms. Arnold is an accountant-liquidator, resident in England. Mentor's parent organization is Mentor Holding Corporation (MHC) which, in turn, is owned by Ocean Drilling & Exploration Co. (ODECO). MHC is a Delaware corporation with its principal place of business in New Orleans, Louisiana. ODECO is also a Delaware corporation with its principal place of business in New Orleans. Pinnacle Reinsurance Co., Ltd., is a reinsurance corporation having contractual relations with insurance company clients, including Mentor. Pinnacle is organized under the laws of Bermuda and has its principal place of business in Bermuda.

Mentor was formed in Bermuda by ODECO as a captive insurer to insure ODECO's oil drilling rigs. Mentor's business later expanded to insurance areas unrelated to ODECO or the oil business. By the 1980's, over 90% of Mentor's business was unrelated to ODECO.

In 1982, 1983, and 1984, Mentor entered into reinsurance agreements with Pinnacle. Reinsurance typically allows an insurance writing company to assign its risk to a reinsurance company in whole or in part. This has the effect of reducing its reportable loss reserves, thereby increasing its reported net worth. Once insurance risks are assumed by the reinsurer, the reinsured need not report these risks as liabilities on its balance sheet. However, certain accounting standards must be met in order for there to be a *bona fide* transfer of risk.

The liquidators allege that Mentor's agreements with Pinnacle, its reinsurance company, did not meet these standards. They contend that for each of the years in question, a secret side letter agreement provided that, notwithstanding the ostensible reinsurance agreement, Pinnacle's obligations would be limited to one fixed amount, unrelated to actual insurance losses, and payable only at the end of ten years. These secret side agreements, the liquidators allege, turned the agreements into financing arrangements ineligible to justify the balance sheet relief that Mentor claimed. The liquidators also allege that Mentor's

financial statements were intentionally falsified by ODECO and its management from at least 1982 to March 1985. They contend that the financial reports materially overstated Mentor's financial health and concealed its dire financial condition by, *inter alia*, failing to disclose and properly account for the true nature of purported reinsurance agreements between Mentor and Pinnacle.

Although ODECO asserts that it did not discover these agreements until 1985, the liquidators allege that ODECO was a party to them all along. In its defense, ODECO contends that there was no falsification, that it relied on the work of Mentor's Bermudian accountants and auditors, and that the agreements were in accordance with generally accepted accounting principles in Bermuda.

Mentor went into involuntary liquidation in June 1985. The majority of Mentor's creditors are in the United States. On March 3, 1986, the liquidators brought this action in federal district court against ODECO, MHC, Pinnacle, and eight individual officer/directors of Mentor and/or MHC and ODECO. The complaint alleged violations of federal mail and wire fraud statutes comprising elements of RICO violations. In addition, plaintiffs asserted pendent state law claims for breach of fiduciary duty, fraudulent trading, and negligent misrepresentation. The *merits* of these arguments are not before us. The *nature* of appellants contentions, however, is relevant to the issue of the degree of relief available in Bermuda courts.

In granting appellees' motion to dismiss the complaint on the grounds of *forum non conveniens*, the district court found that Bermuda was an available and adequate forum, and that both private and public interest factors favored litigation in Bermuda. 683 F.Supp. 1064. Defendant Pinnacle had filed a motion to dismiss for lack of *in personam* jurisdiction over Pinnacle. The district court denied Pinnacle's motion and its motion for reconsideration. The liquidator plaintiffs appeal the court's dismissal of the case on *forum non conveniens* grounds. Defendant Pinnacle cross-appeals the court's denial of its motion to dismiss for lack of personal jurisdiction. In the view we take of this case, Pinnacle's cross-appeal is moot.

II.

Jurisdiction was proper in the trial court based on 28 U.S.C. §§ 1331 & 1332. Jurisdiction on appeal is proper based on 28 U.S.C. § 1291. Appeal was timely filed under Rule 4(a), Fed.R.App.P.

The trial court's decision on the application of the *forum non conveniens* doctrine may be reversed only where there has been a clear abuse of discretion. *Piper Aircraft v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981); *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir.1987), *vacated and remanded on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, ____ U.S. ____, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989).

III.

Our analysis begins with the balancing test set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and its companion case, *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947). Although "a plaintiff's choice of forum should rarely be disturbed," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 258, 70 L.Ed.2d 419 (1981), a federal court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. *Gulf Oil*, 330 U.S. at 507, 67 S.Ct. at 842. When an alternative forum has jurisdiction to hear the case, and when trial in the plaintiff's chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. *Koster*, 330 U.S. at 524, 67 S.Ct. at 832. To guide trial court discretion, the Court has suggested a balancing of "private interest factors" affecting the convenience of the litigants, and "public interest factors"

affecting the convenience of the forum. *See Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843.

Factors pertaining to the private interests of the litigants include the "relative [e]ase of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508, 67 S.Ct. at 843. Public interest factors bearing on the question include administrative difficulties flowing from court congestion, the "local interest in having localized controversies decided at home," the interest in "having the trial of a diversity case in a forum that is at home with the state law that must govern the case," the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-09, 67 S.Ct. at 843.

The teachings of *Gulf Oil* and *Koster* were reaffirmed in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). But *Reyno* added still another dimension to the test. We emphasize this dimension now because it is extremely important in light of the major argument posed by the appellants here. *Reyno* specifically held that plaintiffs may not defend a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the chosen forum. *Id.* at 247, 102 S.Ct. at 261. In *Reyno*, the Court ruled that the possibility of an unfavorable change in the law is merely a factor to be considered, but that ordinarily this factor should not be given conclusive or even substantial weight in the forum inquiry. *Id.* The Court carefully explained that giving such a consideration inordinate weight "is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems." *Id.* at 251, 102 S.Ct. at 263.

In *Reyno*, a small commercial aircraft crashed in the Scottish highlands. The plaintiffs sued the aircraft manufacturer and the company that made the propellers in a United States federal dis-

trict court claiming negligence and strict liability. The district court dismissed the complaint on the basis of *forum non conveniens* after utilizing the *Gulf Oil* balancing test and determining that Scotland was the proper forum. The Court of Appeals for the Third Circuit reversed and improperly held that such a dismissal was inappropriate where the law in the alternative forum was less favorable to the plaintiff's claim. Reversing that ruling, the Supreme Court noted that the Third Circuit's decision was contrary to "every Federal Court of Appeals that ha[d] considered this question after [*Gulf Oil v.*] *Gilbert.*" *Id.* at 250, 102 S.Ct. at 263.

The court was careful to indicate that in certain cases—where the alternative forum could not provide any remedy whatsoever—the unfavorable change in the law could be given substantial weight:

> We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

Id. at 254-255, 102 S.Ct. at 265-266 (footnotes omitted).

This court has found a similar exception to the general rule to be appropriate in cases involving alleged violations of United States antitrust laws. In *Industrial Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.1982), *vacated and remanded on other grounds*, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983), we held that a complaint seeking relief solely under the federal antitrust laws, sections 1 and 2 of the Sherman Act, could not be dismissed under the doctrine of *forum non conve-*

niens. We stated there that to determine Indonesia to be the proper forum for that case would, in effect, "deprive[ ] [plaintiffs] of any remedy." *Reyno*, 454 U.S. at 255, 102 S.Ct. at 265.

> [W]e have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs' Sherman Act claim. A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act.

Mitsui, 671 F.2d at 891.

The crucial point succinctly stated in *Mitsui* was later amplified in *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C.1983):

> Antitrust cases are unlike litigation involving contracts, torts, or other matters recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated. To relegate a plaintiff to the courts of a nation which does not recognize these antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device.

The foregoing relevant legal precepts having been stated, we now turn to the appellants' specific contentions before us.

IV.

It seems to be conceded that Bermuda would not recognize a civil RICO claim. From this basic premise, appellants argue that dismissal in favor of Bermuda would deprive them of a private suit which was conceived by Congress as part of a national scheme of enforcement to protect United States commerce. *See*

Mitsui, 671 F.2d at 891 n. 20 (distinguishing civil obligations owed by one party to another in a tort case from private antitrust suit "conceived as part of the scheme of enforcement of statutes enacted to protect United States commerce.") Appellants argue that to apply the doctrine of *forum non conveniens* to a RICO action would frustrate Congress' intent to give RICO plaintiffs a right of access to a federal forum to seek redress.

To add sinew to this theory, appellants submit an argument in the form of the familiar categorical syllogism. Such an argument consists of comparing two terms—the minor with the major—by means of a middle term, to reach a conclusion. The major premise here is that, under the law of this Circuit, federal antitrust claims are immune from the doctrine of *forum non conveniens*. The minor premise is that RICO claims are, by analogy, the same as antitrust claims. Therefore, appellants conclude, RICO claims should also be immune.

Before us, as in the district court, the appellees challenge the factual basis of the minor premise, thereby vitiating the conclusion urged upon us by the liquidators.

A.

To support their minor premise contention, appellants make detailed reference to RICO's legislative history. They note Congress' intent that "those who have been wronged by organized crime should at least be given access to a legal remedy. . . . It is the intent of this body . . . to see that innocent parties . . . have a right to obtain proper redress. . . ." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241, 107 S.Ct. 2332, 2345, 96 L.Ed.2d 185 (1987) (citing legislative history of RICO treble-damages provision). Appellants further contend that the RICO venue provision, 18 U.S.C. § 1965(a), was intended to be the same as that in the Clayton Act. Br. for appellants at 28 (citing H.Rep.No. 1549, 91st Cong., 2d Sess. 58 (1970)), U.S. Code Cong. & Admin.News 1970, 4007.

From these excerpts of legislative history, the appellants then apply the method of analogy. They argue that, as in the case of

the federal antitrust statutes, RICO is an effort to set forth a national policy to deal with a national threat to the commerce of the United States, and that private suits under the RICO statute are an integral part of Congress' RICO enforcement scheme. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Appellants further contend that the treble damages provision of RICO, in addition to being remedial, was meant to be a deterrent and penalty. *See Sedima*, 473 U.S. at 498-99, 105 S.Ct. at 3285-86. From that they ask us to draw the conclusion that relegating a private RICO plaintiff to a foreign court, in addition to eliminating the remedy, negates the penalty and deterrent imposed by Congress and frustrates the overall national enforcement scheme of RICO legislation. Finally, to drive home their point, they suggest that these are exactly the results this Court sought to avoid in *Mitsui* by rejecting application of the *forum non conveniens* doctrine in the antitrust context.

B.

Appellees respond, noting that the Supreme Court's recent analysis in *Shearson/American Express*, exposes some of the weaknesses of this argument. There the Court compared RICO violations with antitrust violations, but emphasized that RICO's drafters sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance "*society's fight against organized crime.*" *Id.*, 482 U.S. at 241, 107 S.Ct. at 2345 (emphasis added). The Court noted, however, that:

> . . . in fact RICO actions are seldom asserted "against the archetypal, intimidating mobster." . . . ("[O]nly 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals"). . . . The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff. . . .

Id., at 242, 107 S.Ct. at 2345 (citations omitted).

Moreover, the only other Court of Appeals to consider immunizing RICO cases from the *forum non conveniens* doctrine has met the appellants' argument head on and rejected it. In *Transunion Corp. v. Pepsi Co., Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (per curiam), the court noted:

> A review of the legislative history of RICO, however, discloses no mandate that the doctrine of *forum non conveniens* should not apply. . . .

We are satisfied that appellants' legislative history argument proves too much. It has not persuaded us that Congress intended that *forum non conveniens* would not apply to civil RICO actions. Our independent review of the legislative history does not disclose that Congress intended directly or by fair inference to suggest that RICO would be immune from the doctrine's operation. In rejecting this contention as the basis of our decision, we reach the same result as the Court of Appeals for the Second Circuit, albeit for reasons somewhat at odds with theirs. In *Transunion*, the appellants had argued that RICO's broad venue provision mirrored that in the Clayton Act. They then pointed to the Supreme Court's opinion in *United States v. National City Lines, Inc.*, 334 U.S. 573, 68 S.Ct. 1169, 92 L.Ed. 1584 (1948) (*National City Lines I*), holding that the special venue provision in the Clayton Act deprived a court of discretion to dismiss a Sherman Act suit on *forum non conveniens* grounds. The Second Circuit rejected appellants' argument, stating that *National City Lines* was effectively overruled by the codification of the *forum non conveniens* doctrine in 28 U.S.C. section 1404. We think that statement sweeps too broadly.

Section 1404 authorizes the transfer of a case from one federal district court to another federal district court; it cannot apply in cases where the *forum non conveniens* doctrine is used to dismiss a case that must then be brought in a foreign court of law. Therefore, section 1404 only overruled the holding of *National City Lines I* to the extent that it applied to cases that could be transferred from one federal district court to another.

In light of the new congressional mandate regarding transfers, the Supreme Court allowed the same case to be transferred

to another district court on later petition. *United States v. National City Lines, Inc.*, 337 U.S. 78, 69 S.Ct. 955, 93 L.Ed. 1226 (1949) (*National City Lines II*). In that later case, the Court did not indicate what result it would reach in a case where application of the *forum non conveniens* doctrine would lead to dismissal of a Sherman Act case in favor of a foreign forum. Such a situation is not covered by section 1404, which preserves the action, albeit in a different federal venue. Thus, to the extent that the Second Circuit relied on section 1404's overruling of *National City Lines I* to dismiss its own RICO case in favor of a forum in the Philippines, this court has not accepted its reasoning. In *Mitsui*, speaking through Judge Reavley, we said:

> Defendants argue that the Supreme Court "effectively nullified" its holding in *National City Lines* by its second decision in that case, [*National City Lines II*]. Shortly after the Court's first decision, Congress, in an unrelated move, enacted 28 U.S.C. § 1404(a), which authorizes the district courts to "transfer any civil action to any other district or division" "[f]or the convenience of parties and witnesses." In *National City Lines II*, the Court, relying on the legislative history and the broad term "any civil action," concluded that the transfer statute applied to antitrust actions. 337 U.S. at 80-84, 69 S.Ct. at 956-58. The Court in no way questioned its earlier holding concerning the effect of [the venue provision of the Clayton Act] on common law *forum non conveniens*. Since defendants can point to no statute authorizing dismissal of an action on *forum non conveniens* grounds, *National City Lines II*, does not help them in any way.

671 F.2d at 890-91 n. 18. Having said this, we proceeded to deny dismissal on a very narrow and discrete ground—the impossibility of plaintiffs obtaining any remedy at all for their antitrust-based claims in Indonesia. We would not dismiss the case under *forum non conveniens* because such action would have been "the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act." *Id.* at 891.

C.

Accordingly, we must now turn to what we believe to be the critical issue in this case: Without the RICO claim, will the plaintiffs "be deprived of any remedy" on the basis of the factual predicate of their complaint? The important inquiry here is whether the facts more resemble the products liability facts of *Reyno* or the antitrust facts of *Mitsui*. If they come within the rule of *Reyno*, appellants attempt to prove RICO immunity must fail; if they come within the rule of *Mitsui*, they will prevail.

To ask this question is to answer it. The district court specifically found that even without the RICO count, Bermuda permits litigation in its courts of the fraud, negligent misrepresentation, breach of fiduciary duty, and piercing the corporate veil counts of the liquidators' complaint. Bermuda courts are totally competent to adjudge the claims that defendants falsified Mentor's financial statements, that the statements materially overstated Mentor's financial health and concealed its dire financial condition, and that they failed to disclose and properly account for the true nature of the purported reinsurance agreements between Mentor and Pinnacle[ ].

Moreover, the district court found that the Bermuda trial courts have the power to "see to it that defendants make good whatever harm they did." Dist. ct. opin. at 1071. Accordingly, we conclude that "although [the liquidators'] potential damage award may be smaller, there is no danger they will be deprived of any remedy or treated unfairly." *Reyno*, 454 U.S. at 255, 102 S.Ct. at 265. This case is a far cry from *Mitsui*, where the complaint was solely bottomed on Sections 1 and 2 of the Sherman Act. In that case, dismissal in favor of a forum in Indonesia would have been the functional equivalent of denying the plaintiffs any remedy whatsoever.

We conclude, therefore, that the material facts here more closely resemble the facts in *Reyno* and should be subject to the same analysis employed there.

V.

We are satisfied that the district court correctly utilized the *forum non conveniens* analysis set out by the Supreme Court in *Gulf Oil Corp. v. Gilbert* and *Piper v. Reyno*, and by this court in *In re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147 (5th Cir.1987), *vacated and remanded on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, ____ U.S. ____, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989). This analysis requires a district court to first decide whether an available and adequate forum exists. "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. . . . A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly . . . even though they may not enjoy the same benefits as they might receive in an American court." *Air Crash Disaster*, 821 F.2d at 1165. If the court decides that the foreign forum is both available and adequate, it must then consider the parties' private interests, allowing for the relevant deference given the plaintiff's choice of forum, and factors of the public interest, such as burdens upon the court, public interest in the dispute, and questions of foreign law. *Id.* at 1165-66. The court should consider the specific factors set forth in part II of this opinion and enumerated in *Gulf Oil* and *Koster*.

The district court correctly determined that Bermuda is both an available and adequate forum. Although the RICO cause of action is not available in Bermuda, a forum is inadequate only where it would afford a plaintiff no remedy at all. *Air Crash Disaster*, 821 F.2d at 1165. The district court found that plaintiffs would be able to bring all their other causes of action before the courts in Bermuda. The court then carefully examined the private interests of the litigants. All defendants have agreed to stipulate to jurisdiction in Bermuda. Mentor is a Bermuda corporation heavily regulated by Bermuda law. The agreements at issue were between Mentor and Pinnacle, also a Bermuda company with offices located only in Bermuda. The agreements provide that disputes are to be arbitrated in Bermuda, and provide for the application of the laws of Bermuda to the agreements.

Both plaintiffs and defendants have identified numerous individuals and corporations residing in Bermuda whose testimony at trial will be significant. The district court pointed out that plaintiffs have identified as potential witnesses only three non-party individuals within the Louisiana court's subpoena power. The court also made dismissal subject to a six-month stay to permit discovery in the United States.

Finally, plaintiffs in this case are a Bermudian and an Englishman, representing a Bermuda corporation. Both this court and the Supreme Court have recognized that a foreign plaintiff's choice of an American forum deserves less deference than an American citizen's selection of his home forum. *Reyno*, 454 U.S. at 255-56, 102 S.Ct. at 265-66; *Air Crash Disaster*, 821 F.2d at 1164.

The district court also analyzed the public interest factors here, including the "drain on the court's time and energy which trial in New Orleans will entail." Dist. ct. opin. at 1070. With regard to the local interest in having localized controversies resolved at home, the court explained that Bermuda is an international insurance center and has a strong interest in regulating its industry so as to retain credibility abroad. *Id.* at 1070. In contrast, the defendants' residence in Louisiana does not represent any broader interests of the state in this action. *Id.* at 1071. Finally, the court found that trial of this matter will entail the application of Bermudian law to at least two of the causes of action. *Id.* at 1072.

We conclude that the district court did not abuse its discretion in deciding that both private interest factors affecting the convenience of the litigants and the public interest factors affecting the convenience of the forum favor resolution of this lawsuit in Bermuda rather than in Louisiana.

VI.

We have considered all other contentions raised by the appellants. The judgment of the district court is

AFFIRMED.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3763

CHARLES W. KEMPE, JR. and MICHAEL J. ARNOLD, in Their Capacity as Joint Liquidators of Mentor Insurance Limited,

Plaintiffs-Appellants
Cross-Appellees,

versus

OCEAN DRILLING & EXPLORATION COMPANY, ET AL.,

Defendants-Appellees,

and

PINNACLE REINSURANCE COMPANY, LIMITED,

Defendant-Appellee
Cross-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 23; 5 Cir., 1989, ____ F.2d ____)
(July 24, 1989)

Before

ALDISERT*, REAVLEY and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

THOMAS M. REAVLEY
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

* Circuit Judge of the Third Circuit, sitting by designation.

Appendix C

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

Nos. 86-0352, 86-0891, 86-3535

April 15, 1988

CHARLES W. KEMPE, JR., et al.,

v.

OCEAN DRILLING & EXPLORATION COMPANY, et al.

In action involving insurer in involuntary liquidation in Bermuda, its parent and its alleged alter ego, the District Court, Livaudais, J., on defendants' motion to dismiss on ground of forum non conveniens, held that Bermuda was a more convenient forum.

Motion granted.

Phelps, Dunbar, Marks, Claverie & Sims, Harry S. Rosenberg & James P. Reid, Harry S. Redmon, Jr. T.A., Richard N. Dicharry, New Orleans, La.; Davis, Polk & Wardwell, Paul R. Koepff, New York City, of counsel, David M. Spector, Ronald A. Jacks, Steven R. Gilford, James K. Meguerian, Bettina Getz, Mayer, Brown & Platt, Chicago, Ill., for Ocean Drilling & Exploration Co., and Murphy Oil Corp. Mentor Holding Co., Robert J. Sweeney, Hugh J. Kelly, James L. Kilpatrick and Tucker H. Couvillon, in No. 86-0352.

McGlinchey, Stafford, Mintz, Cellini, & Lang, Dermot S. McGlinchey, T.A., B. Franklin Martin, III, Maureen O'Con-

nor Sullivan, New Orleans, La., for National Union Fire Ins. Co. of Pittsburgh Pa., in No. 86-0352.

Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot, George A. Frilot, III, Roger A. Stetter, New Orleans, La., for William L. Colson, Ronald W. Herman, Clovis H. Steib, Odie F. Vaughan, in No. 86-0352.

Breazeale, Sachse & Wilson, Gordon A. Pugh, T.A., Claude F. Reynaud, Jr., Baton Rouge, La., for J. Douglas Higley, in No. 86-0352.

Montgomery, Barnett, Brown, Read, Hammond & Mintz, Stanley McDermott, III, New Orleans, La., Lord, Day & Lord, Michael J. Murphy, T.A., Laurie E. Foster, New York City, for plaintiffs, in No. 86-0891.

Phelps Dunbar Marks Claverie & Sims, Harry A. Rosenberg, T.A., & Harry S. Redmon, New Orleans, La., for Ocean Drilling & Exploration Co., Mentor Holding Corp., William L. Colson, Clovis H. Steib, Ronald W. Herman, Odie F. Vaughan, James L. Kilpatrick, Hugh J. Kelly, Herman S. Kelley, in No. 86-0891.

Sessions, Fishman, Rosenson, Boisfontaine, Nathan & Winn, Robert E. Barkley, Jr., T.A., New Orleans, La., for Pinnacle Reinsurance Co., in No. 86-0891.

Breazeale, Sachse & Wilson, Murphy J. Foster, III, Gordon A. Pugh, T.A., Baton Rouge, La., for J. Douglas Higley, in No. 86-0891.

Isham, Lincoln & Beale, Ronald A. Jacks, David M. Spector, Steven R. Gilford/Paul W. Schroeder, Mayer, Brown & Platt, Chicago, Ill., for Ocean Drilling & Exploration Co., Mentor Holding Corp., Hugh J. Kelly, James L. Kilpatrick, in No. 86-0891.

Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot, George A. Frilot, III, Roger A. Stetter, Eades L. Hogue, New Orleans, La., for Odie F. Vaughan, William L. Colson, Herman S. Kelley, Ronald W. Herman, Clovis H. Steib, in No. 86-0891.

D'Amato & Lynch, Timothy Butler, New York City, McGlinchey, Stafford, Mintz, Cellini & Lang, Dermot S. McGlinchey, T.A., B. Franklin Martin, III, Maureen O'Con-

nor Sullivan, Anthony Rollo, New Orleans, La., for plaintiff in No. 86-3535.

Davis, Polk & Wardwell, New York City, for Murphy Oil Corp., Ocean Drilling & Exploration Co., Defendant Class Consisting of the Board of Directors Ocean Drilling & Exploration Co. and Mentor Ins. Ltd. (Bermuda), in No. 86-3535.

Phelps, Dunbar, Marks, Claverie & Sims, Harry A. Rosenberg, T.A., Harry S. Redmon, Jr., New Orleans, La., for Murphy Oil Corp., Ocean Drilling & Exploration Co., Mentor Holding Corp., Robert J. Sweeney, Hugh J. Kelly, James J. Kilpatrick, Tucker H. Couvillon, in No. 86-3535.

MEMORANDUM OPINION AND ORDER

LIVAUDAIS, *District Judge*:

> The voluminous record in this case is the result of a veritable deluge of filings, a hurricane of paperwork. . . .
>
> *Tucker v. Summers*, 784 F.2d 654, 655 (5th Cir.1986)
>
> Compared to these storms, death is but a qualm, Hell somewhat lightsome, and the Bermudas calm.
>
> John Donne, "The Storm"

This matter is before the Court by way of four separate motions: (1) the motion of defendants Ocean Drilling & Exploration Company ("ODECO"), Mentor Holding Company ("MHC"), Hugh J. Kelly and James L. Kilpatrick for a declaration of applicable law; (2) the same defendants' motion to dismiss the complaint for failure to state a claim; (3) the motion of all defendants to dismiss on the ground of *forum non conveniens*; and (4) the motion of defendant Pinnacle Reinsurance Company, Ltd. ("Pinnacle"), made in the alternative to the *forum non conveniens* motion, to certify for appeal the Court's previous order denying Pinnacle's motion to dismiss for lack of personal jurisdiction. Record Documents ("R.D.") 127, 153. These motions were argued on various dates, and all were taken under submission on November 6, 1987. R.D. 224. For the rea-

sons that follow, we grant the third, and dismiss the first, second, and fourth as moot.

Mentor is an insurance company incorporated under the laws of Bermuda. It is totally owned by MHC, which is in turn a subsidiary of ODECO. Mentor became the subject of an involuntary liquidation proceeding in Bermuda on June 6, 1985. The complaint herein alleges that ODECO was the alter ego of Mentor and so controlled its affairs that it should be responsible for Mentor's entire net deficiency. The complaint further alleges that Mentor's financial statements for fiscal years 1982 and 1983 were false because they incorrectly reported two reinsurance transactions between Mentor and Pinnacle (another Bermuda insurance company). As alleged in the complaint, those financial reports materially overstated Mentor's financial condition.

It is the contention of the defendants that Bermuda is a more convenient forum for the adjudication of the instant lawsuit. Fortunately, district courts have been furnished abundant guidance in resolving *forum non conveniens* motions, particularly by *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir.1987) (*en banc*), *petition for cert. filed*, (U.S. November 6, 1987) (No. 87-750) ("*Air Crash*"), which formulated "the controlling procedure by which a district court should apply the . . . principles of *forum non conveniens*." *Id.* at 1165.

Air Crash sets out a series of factors which the district court should weigh in determining whether a proposed forum is available and adequate, and, if so, whether the private interests of the litigants or public interests favor trial in the foreign forum. While final determination of the convenience *vel non* of a particular forum is entrusted to the trial court's discretion, *Air Crash* requires "an exercise in structured discretion" by careful adherence to a step-by-step analysis and with the district court setting out "its decision making process clearly and in sufficient detail to permit [the Court of Appeals] adequately to review it, either by giving written reasons or by dictating the reasons for its decision into the record with the same degree of explicitness." *Id.* at 1165; 1166 n. 32.

As already noted, we must first decide whether the proposed alternate forum, Bermuda is available and adequate. "A forum is available when the entire case and all the parties can come within the jurisdiction of that forum." *Id.* at 1165. It is unquestioned that the plaintiffs, appointed by a Bermuda court to wind up the affairs of Mentor, are subject to jurisdiction in Bermuda. The Court further finds that all defendants in this action have agreed to submit to jurisdiction in Bermuda and to waive any defenses of laches or prescription. R.D. 217 at 2.

Plaintiffs contend, however that Bermuda is not an available forum because National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") has not agreed to submit to Bermuda jurisdiction.[1] We observe that National Union is not a party to this litigation, but rather to *Ocean Drilling & Exploration Co., et al. v. National Union Fire Ins. Co. of Pittsburgh, Pa., et al.*, C.A. 86-352 and *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murphy Oil Corp., et al.*, C.A. 86-3535, which two cases have been consolidated with the instant matter for discovery purposes only, the Court having expressly rejected a motion for consolidation for trial as well. *Ocean Drilling & Exploration Co., et al. v. National Union,* C.A. 86-352, R.D. 51. Moreover, National Union has agreed to a stay of the aforementioned proceedings pending resolution of this litigation in Bermuda, R.D. 217 at 2-3, the outcome of which could assertedly moot the two National Union cases. Accordingly, we find that Bermuda is an available forum. *Cf. Syndicate 420 at Lloyd's London v. Early Am. Ins.*, 796 F.2d 821, 830 (5th Cir.1986) ("the defendant's submission to the jurisdiction of an alternative forum renders that forum available for purposes of *forum non conveniens* analysis.")

A forum is adequate "when the parties will not be deprived of all remedies or treated unfairly . . . even though they may

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1 Plaintiffs also appear to contend that Bermuda is not an "available" forum because (a) their RICO causes of action will vanish in Bermuda and (b) because defendants contend that the complaint otherwise fails under Bermuda law to state any cause of action. Plaintiffs believe, therefore, that "the entire case" *Air Crash*, 821 F.2d at 1165, cannot come before a Bermuda court. We regard these arguments as an attack upon the adequacy of the forum, and therefore treat them under that rubric.

not enjoy the same benefits as they might receive in an American court." *Air Crash*, 821 F.2d at 1165. Plaintiffs' first amended complaint advances as theories of recovery RICO, common law fraud, negligent misrepresentation, piercing the corporate veil, and breach of fiduciary duty. R.D. 139.

Plaintiffs contend Bermuda is an inadequate forum because: (1) their RICO claim cannot be heard in Bermuda (indeed, plaintiffs go so far as to claim that the doctrine of *forum non conveniens* is not applicable to RICO suits); (2) the complaint is otherwise read by the defendants as failing to state a claim under Bermuda law; and (3) plaintiffs would be prejudiced because Bermuda court rules provide more restrictive discovery than that available in the United States.

We find these arguments unpersuasive. First, the Fifth Circuit has recently held that "The [*forum non conveniens*] principles enunciated in [*Piper Aircraft Co. v.*] *Reyno*, [454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)] apply in *all* cases regardless of their jurisdictional bases or subject matter." *Air Crash*, 821 F.2d at 1163 (original emphasis). This language, together with the Second Circuit's express ruling in *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987) that RICO suits are subject to *forum non conveniens* dismissal, strongly indicates that *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.1982), which held the doctrine of *forum non conveniens* categorically inapplicable to antitrust actions, and upon which decision plaintiffs heavily rely, ought at best be confined to its facts.

Second, neither the unavailability of RICO nor any alleged deficiencies in the complaint are sufficient to render Bermuda an inadequate forum. A forum is inadequate only where it would afford a plaintiff no remedy at all, *Air Crash*, 821 F.2d at 1165, as where the forum does not "permit litigation of the subject matter of the dispute." *Reyno*, 454 U.S. at 252 n. 22, 102 S.Ct. at 265 n. 22. There is no doubt that Bermuda "permits litigation" of the subject matter of the non-RICO counts of the complaints herein, namely common law fraud, negligent misrepresentation, breach of fiduciary duty, and piercing the corporate veil. Therefore, for the purposes of *forum non con-*

veniens analysis, plaintiffs will not be deprived of "all remedies" by trial in Bermuda.

Third, Bermuda's allegedly more restrictive discovery practices will impose no greater burden on plaintiffs than they will on defendants, so plaintiffs cannot complain of being treated unfairly, and, in any case, unless Bermuda discovery is so unfair as to constitute a complete denial of due process, it should receive little if any consideration in *forum non conveniens* analysis. *See, Reyno*, 454 U.S. at 252 & n. 18, 102 S.Ct. at 264 & n. 18. Finally, any possible prejudice to plaintiffs will be all but eliminated by making dismissal subject to a six month stay to allow the parties to complete discovery in the United States before proceeding to Bermuda. *Cf. Coakes v. Arabian American Oil Co.*, 831 F.2d 572, 573-4 (5th Cir.1987) (*forum non conveniens* dismissal approved where conditioned on 120 day stay to afford plaintiffs compulsory process and protection of district court to depose U.S. witnesses).

We therefore conclude that Bermuda is an available and adequate forum, and we turn to a consideration of the private interests of the parties. *Air Crash*, 821 F.2d at 1162.

First, as to the relative ease of access to sources of proof, defendants contend that the great bulk of documentary evidence is in Bermuda. That evidence assertedly comprises: records of Mentor; records in the Bermuda office of Arthur Young & Company pertaining to Walton Insurance Company, Belvedere Insurance Company, Ltd., I.C. Industries Insurance Company, Ltd.; and the records of Tate and Lyle Reinsurance Company, Ltd. Such evidence is necessary, contend defendants, to show the propriety of the accounting treatment accorded the reinsurance agreements between Pinnacle and Mentor, which have been attacked by the plaintiffs herein. Although it appears that defendants already have access to Mentor's records (as well as to records pertaining to Mentor from Pete Marwick & Mitchell in Bermuda), yet we find that the defendants' professed need for documents from Bermuda third parties tips this factor in favor of trial in Bermuda.

The second private interest factor is the availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses. Ini-

tially, we acknowledge that the moving defendants bear a burden of persuasion running to all elements of the *forum non conveniens* analysis and must provide enough information to enable the court to balance the parties' interests. *Air Crash*, 821 F.2d at 1164-65. Nevertheless, it is not necessary for defendants to give "a detailed development of [their] entire case," *id.* at 1165 n. 28; it is not necessary that affidavits support the motion, *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379-80 (5th Cir.1988); and, according to the circumstances of the case, it is not even necessary to *identify* the witnesses defendants plan to use (let alone prove that they are unwilling to attend trial in plaintiffs' selected forum), *Reyno*, 454 U.S. at 258, 102 S.Ct. at 267. We therefore reject plaintiffs' repeated assertion that the defendants' motion must fail because they "have not proffered a single affidavit demonstrating either the materiality of [defendants' proposed] witnesses or their unwillingness to come to New Orleans to testify." R.D. 214 at 39. Rather, it is the Bermuda residence of large numbers of witnesses, including those whom defendants *and* plaintiffs desire to use, which makes Bermuda the more convenient forum, as will appear more fully from the following analysis.

Defendants have identified numerous individuals and corporations, all residents of Bermuda, whose live testimony at trial is claimed to be important to defendants' case. These are Robert Steinhoff and Kenneth O'Neill, auditors of Mentor at Peat, Marwick & Mitchell's Bermuda office (defendants expect to use other Peat Bermuda personnel as well), R.D. Spurling, Bermuda counsel to Walton Insurance Company, whose testimony is sought concerning the propriety of the accounting treatment accorded the reinsurance agreement between Walton and Pinnacle, an agreement defendants contend is virtually identical to the one between Mentor and Pinnacle; representatives of Arthur Young & Company in Bermuda, who conducted the audits of Walton Insurance Company (plaintiffs, though partners in Arthur Young in Bermuda, apparently did not conduct those audits, and hence cannot testify about them before this or any other court); John Kemp, Bryan Martin and Allen Dunkle of Finance and Risk Services, Ltd., who assisted the management of Mentor's run off and whose testimony will be

sought concerning the issues of damages and Mentor's net deficiencies; James Pearman and John Boden, formerly resident directors of Mentor, whose testimony is sought by defendants because *plaintiffs* support an important facet of their case—*viz.*, that Mentor was entirely controlled by ODECO from New Orleans—by reference to two letters from these individuals; Angus Hyslop, Mentor's former controller, whose testimony is sought concerning Mentor's true financial picture and corporate independence *vel non* from ODECO (we note that although Mr. Hyslop, in the National Union suits, is a member of the defendant class of all officers and directors of Mentor, yet those suits are not, contrary to plaintiffs' assertion, consolidated with this action for trial, *Ocean Drilling & Exploration Co., et al. v. National Union*, C.A. 86-352, R.D. 51); and various Bermuda government officials, including Mentor's official receiver, the Bermuda Minister of Finance, and officers of insurance trade associations, whose testimony will be sought concerning the ordinary relations between captive Bermuda insurance companies and their corporate parents (although plaintiffs contend such witnesses *may* claim official immunity and refuse to testify, it appears that such a privilege can and might be waived, R.D. 219 supporting affidavit of Michael Melo at 10). Additionally, it should be noted that plaintiffs desire to call as witnesses at trial representatives of Heddington Insurance in Bermuda.

Counterbalancing these Bermuda witnesses, plaintiffs have identified as potential witnesses three non-party individuals within this court's trial subpoena power: J. Gordon Reisch, James Browning, and William Hoffman, all residents of New Orleans and all employed at pertinent times by Peat, Marwick & Mitchell in New Orleans. Additionally, plaintiffs seek to use the testimony of Stephen Cosse, ODECO's general counsel, other unidentified employees of ODECO, and defendant Douglas Higley. However, defendants Higley and ODECO have agreed to submit to Bermuda jurisdiction, and ODECO has further agreed to produce not only Mr. Cosse but any of its employees for trial testimony in Bermuda.

Plaintiffs have also named a great number of witnesses whose testimony they seek, but witnesses who are beyond the trial subpoena power of this court. These witnesses are: personnel from Peat, Marwick & Mitchell's U.S. offices, including James Faber (New York), Daniel Howell (resident of Arizona and New Jersey), and Richard Hirschman (New York); Herman Schwinde, former president of Mentor (New York); John Swift, Mentor's in-house actuary (Ohio); Mentor's and ODECO's various New York bankers; representatives of Murphy Oil Corporation in Arkansas; Michael Quinones, Mentor's underwriter (Connecticut); members of the law firm of Wilson, Elsen, Edelman and Dicker, which issued an opinion letter concerning the Pinnacle reinsurance agreement (New York); representatives of National Union, a Pennsylvania corporation with its principal place of business in New York City; and representatives of American Re. & Metropolitan Re., American insurance companies allegedly involved, like Heddington Insurance in Bermuda, as "fronts for the reinsurance by Mentor of risks underwritten by Mentor Insurance Company (U.K.), Ltd., for which relevant witnesses . . . will be found in the United States," R.D. 214 at 38, although plaintiffs do not specify where.

We hold that the foregoing hypothetical "witness lists" establish that considerably more live trial testimony will be available in Bermuda than in New Orleans, where it appears that relatively few witnesses reside. The parties will still be able to depose the large number of witnesses residing elsewhere in the United States, since the Court will subject its order of dismissal to a six month stay to allow discovery. (Plaintiffs assure us that "once this motion faucet is turned off, the parties could complete discovery in six months," R.D. 214 at 53.) *See Coakes v. Arabian American Oil Co.*, 831 F.2d at 573-74. As the overwhelming number of these witnesses reside in and around New York, we further hold that Bermuda is closer and more convenient forum than New Orleans, should any of them be willing to testify at trial. This last holding resolves in favor of trial in Bermuda the third private interest factor, which is "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Air Crash*, 821 F.2d at 1162.

We conclude that the fourth private interest factor, the possiblity of view of the premises, is not relevant to this action.

The fifth private interest factor is the enforceability of a judgment if one is obtained. The U.S. defendants have stipulated that any final judgment obtained by plaintiffs in Bermuda shall be accorded full faith and credit "in any United States District Court in which plaintiffs seek to enforce said judgment." R.D. 217 at 2. We therefore find that a judgment will be enforceable against these defendants whether plaintiffs procure it in this forum or in Bermuda.

The last private interest factor is the timeliness of the motion. Although plaintiffs deal with this factor as if it were a threshold issue and a potential bar to the instant motion, the Fifth Circuit in *Air Crash* expressly indicates that timeliness should be considered as but one of the private interest factors. *Air Crash*, 821 F.2d at 1165 & n. 30. Plaintiffs regard the instant motion as untimely because the motion was not made until a year and a half after suit was filed even though the defendants all the while purportedly knew of the factors they now claim support the motion. Plaintiffs contend that this untimeliness caused themselves and the court to incur costs and inconveniences, largely as a result of this motion's being urged after, rather than before, defendant Higley's motion to disqualify counsel, Pinnacle's motion to dismiss for lack of personal jurisdiction (which were previously ruled upon, R.D. 78, R.D. 127 and R.D. 153) and the motions to dismiss for failure to state a claim, for a declaration of applicable law, and to certify (which are disposed of herein). We find, however, that in light of the magnitude and complexity of this case, the delay of a year and half for filing the motion does not demonstrate that defendants were dilatory, particularly since defendants' work on their motion for declaration of applicable law provided important information for the choice of law and foreign law issues that must be considered among public interest factors in their *forum non conveniens* motion. We also note that this case has not reached the discovery stage, and we infer that dismissal at this juncture will not prejudice the parties' ability to prepare for trial. We therefore conclude that the private interest factors together weigh in favor of trial in Bermuda.

"As no one set of factors is conclusive, we also address the factors of public interest." *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 879 (5th Cir.1987). First, with respect to administrative difficulties flowing from court congestion, we find that the record already amassed and the proceedings already conducted grimly foreshadow the drain on the court's time and energy which trial in New Orleans will entail. Moreover, agreement to stay the two related *National Union* suits pending resolution of this case in Bermuda will remove a not inconsiderable burden from this court's docket, which relief, according to the outcome in Bermuda, may be more than temporary. R.D. 217.

The second public interest factor is the local interest in having localized controversies resolved at home. The alleged injury herein occurred to a Bermuda corporation whose affairs are being wound up under the laws of Bermuda, with any recovery going to the estate in receivership. It further appears that Bermuda has the third largest reinsurance market in the world; the regulation of insurance reflects Bermuda's interest in maintaining its credibility as an international insurance center. R.D. 195 Exhibit 3B at 3-8. More particularly, these regulations required of Mentor annual audits, and the propriety of these audits as reflected in Mentor's financial statements for the fiscal years 1982 and 1983 is at the very heart of this lawsuit. We find that it follows ineluctably that with respect to the accounting practices challenged by plaintiffs in this suit, Bermuda has an interest dwarfing any this forum might have (which largely consists in the Louisiana residence of most of the defendants). Bermuda expressed its particular interest in this case in 1985, when, at the urging of the Bermuda Underwriters Association, the Government intervened to thwart ODECO's attempt to remove Mentor's records from Bermuda to Louisiana. R.D. 195 at 18 & Exhibit 9.

Nevertheless, plaintiffs, for several reasons, believe Louisiana has an interest in this litigation which would warrant retaining jurisdiction. First, plaintiffs argue that in rejecting Pinnacle's earlier motions to dismiss for lack of personal jurisdiction, the Court has already found this forum to have an interest in this litigation. Plaintiffs rely on the following language from the Court's opinion: "where most of the defen-

dants are residents of Louisiana, and where plaintiffs' RICO causes of action constitute a strong interest in having the suit entertained in this forum." R.D. 153 at 5.

Plaintiffs have miscontrued this language, which was explicitly an application of *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Etc.*, ____ U.S. ____, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) which set this test to determine whether the exercise of personal jurisdiction in a particular case passed constitutional muster: "A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief." *Id.* 107 S.Ct. at 1034. Thus, properly understood, we observed: "Most of the defendants are residents of Louisiana [who at that time had not yet consented to suit in Bermuda], and . . . plaintiffs' RICO causes of action constitute a strong interest [on the part of the plaintiffs in obtaining relief] in having the suit entertained in this forum." Although we were (and are) prepared to recognize that the Louisiana residence of most of the defendants constitutes a Louisiana interest in the exercise of jurisdiction, we cannot say that the residence of the defendants is nearly enough to make Louisiana the more convenient forum. *Cf. Reyno*, 454 U.S. at 250, 102 S.Ct. at 263 ("Jurisdiction and venue requirements are often easily satisfied.") Of course, as noted above, we expressly refuse to consider plaintiffs' RICO causes of action as interests of the forum for the purposes of *forum non conveniens* analysis.

Second, according to plaintiffs, numerous fraudulent acts occurred in Louisiana, including review and approval of drafts of the Pinnacle agreement and side letters; and plaintiffs find in Mentor's 1983 financial statement, which was distributed from New Orleans, an additional basis for Louisiana interest. We observe that although Louisiana may have a generalized interest in discouraging fraud, and even a more particularized interest In discouraging fraud by Louisiana residents, "the incremental deterrence that would be gained if this trial would be held in a [Louisiana] court is likely to be insignificant. The [Louisiana] interest in this [issue] is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required should the case be tried here." *Reyno*,

454 U.S. at 260-61, 102 S.Ct. at 268. If the defendants have perpetrated the fraudulent and negligent acts averred by the complaint, we are confident that a Bermuda trial court will see to it that defendants make good whatever harm they did, contrary to plaintiffs repeated representations that defendants will go unpunished if they are not tried here.

Third, plaintiffs claim to represent the interest of Mentor's creditors, many of whom are assertedly located in Louisiana, although plaintiffs do not say how many, or what percentage of all creditors. In any case, we find this alleged Louisiana interest to be oblique and speculative, whereas Bermuda's interests in Mentor's recovery are direct and concrete.

Fourth, according to plaintiffs, Louisiana has a regulatory interest in this litigation because Mentor was subject to and complied with various Louisiana laws and regulations when Mentor wrote "Excess and Surplus" insurance in Louisiana. However, whatever regulatory interests Louisiana may once have had in Mentor is scarcely reflected in this litigation, which arises out of no Louisiana risk insured by Mentor and involves no claims by Louisiana insureds against Mentor. Moreover, as defendants note, the proposition that Louisiana has a "regulatory interest" in this litigation cannot be squared with the fact that the Louisiana Insurance Department has closed its file on Mentor. R.D. 194, Exhibit 13.

We therefore conclude that the second public interest factor, having localized controversies resolved at home, favors trial in Bermuda.

The last public interest factor is the avoidance of unnecessary problems in conflicts of law, or in the application of foreign law. As a general rule, "a choice of law analysis is only tangentially relevant to . . . *forum non conveniens* analysis and . . . a court need not perform a choice of law analysis before its *forum non conveniens* analysis." *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1378 (5th Cir. 1988). Indeed, ruling on the pending choice of law motion would involve the court in those very labors that the doctrine of *forum non conveniens* has repeatedly been recognized as meant to prevent.

Nevertheless, without fully disposing of defendants' choice of law motion, we find that trial of this matter will entail the

application of Bermuda law, at least to two of plaintiffs' causes of action.

As a preliminary matter, it is necessary to acknowledge the court's obligation to apply the choice of law principles of the forum state, Louisiana, which has adopted the interests analysis principles of the *Restatement* (Second) *Conflict of Laws* (1971) ("*Restatement*"). *Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La.1973). There appears to be little doubt that a Louisiana court would apply Bermuda law to Counts VI and VII of the amended complaint, R.D. 139 (and we therefore find it unnecessary, for *forum non conveniens* analysis, to discuss the complaint's other counts). Count VI prays that Mentor's corporate existence be discarded and that ODECO be held liable for all of Mentor's net deficiency. R.D. 139 at 28-33. The *Restatement* at section 307 provides that: "[t]he local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions into its creditors for corporate debts." This principle is reiterated elsewhere: "*Insofar as this protection is accorded them in the state of incorporation*, a state will usually recognize the immunity of the shareholders of a foreign corporation from being sued as individuals on matters arising out of the acts or omissions of the corporation and from having their individual property made responsible for the obligations of the corporation." *Restatement* section 297, Comment (c) (emphasis added).

As plaintiffs insist, these rules contemplate the application of interest analysis to piercing the corporate veil claims; nevertheless, for reasons stated elsewhere in this opinion, we find that Bermuda's interests in this litigation outweigh those of Louisiana and compel application of Bermuda law to Count VI. Moreover, it is not disputed herein that Mentor was incorporated in Bermuda, that its principal place of business was in Bermuda, that it maintained offices and a staff in Bermuda, and that its records were (and thanks to the intervention of Bermuda itself, are still) located in Bermuda. A Louisiana court has applied the laws of the state of incorporation in similar circumstances. *See*, *QuicKick, Inc. v. QuicKick International*, 304 So.2d 402 (La.App. 1st Cir.1974) *cert. denied*, 305 So.2d 123

(La.1974). The cases cited by plaintiffs to support the application of Louisiana law involved corporations whose only contact with the foreign state was "the naked fact of the corporation." *E.g.*, *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir.1959).

Count VII alleges breach of fiduciary duty by directors and officers of Mentor, to which cause of action the principles of the *Restatement* compels application of Bermuda law:

> The local law of the state of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship . . . to the parties and the transaction, in which event the local law of the other state will be applied. *Restatement*, section 309.

It is certain that this section applies to Count VII: "Liability will typically be imposed upon directors under the rule of this section for such matters as the fraudulent or negligent mismanagement of the corporation's affairs. . . ." *Id.* Comment (A). Moreover, the *Restatement* elsewhere confirms that courts usually apply the laws of the state of incorporation in a suit involving the "internal affairs of a corporation," "internal affairs" being defined as "the relations inter sese of the corporation, its stockholders, directors, officers, or agents." *Id.* section 313 Comments (A), (E).

It has also been expressly held that a Louisiana court would apply the laws of the state of incorporation to *any* cause of action requiring a determination of "the relations inter sese of the corporation" except "where the only contact point with the incorporating state is the naked fact of incorporation, and where *all* the other contact points . . . are found in another jurisdiction." *Glazer v. Glazer*, 374 F.2d 390, 407 (5th Cir.1967) (*quoting Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d at 321) (emphasis added). Such an exception does not apply to Mentor, as far from "*all* the other contact points" are in Louisiana.

We therefore conclude that trial of this matter in Louisiana will involve problems not only with conflicts of laws but also with the application of Bermuda law.

We further conclude that the public interest factors as well as the private interest factors favor trial of this matter in Bermuda.

Accordingly, IT IS ORDERED that the motion of defendants for dismissal on the ground of *forum non conveniens* is hereby GRANTED, subject to the following conditions:

(1) That this order of dismissal is subject to a stay of six months, until October 14, 1988, to allow the parties to complete discovery in this country;

(2) That defendants file in the record herein not later than May 16, 1988 a stipulation that they will submit to the jurisdiction of the courts of Bermuda in response to any suit reasserting the plaintiffs' claims as set forth in the first amended complaint herein;

(3) That defendants file in the record herein not later than May 16, 1988 a stipulation that in response to the plaintiffs' claims as reasserted in the Bermuda courts they waive all defenses based upon laches, any statute of limitation or other timeliness defense, provided only that the plaintiffs' claims have been reasserted in Bermuda not later than October 14, 1989;

(4) That all defendants file in the record herein not later than May 16, 1988 a stipulation that in the event plaintiffs should obtain a final judgment against defendants in the courts of Bermuda which becomes subject to execution, defendants agree that full faith and credit shall be accorded said judgment in any United States District Court in which plaintiffs seek to enforce said judgment:

(5) That defendants file in the record herein not later than May 16, 1988 a stipulation that each defendant will give evidence at trial and produce documents in its possession, custody and control in accordance with the rules of the Supreme Court of Bermuda, 1952, or as they may subsequently be amended, as if each defendant were a resident

of Bermuda and the documents (and, in the case of corporate defendants, employees) were located in Bermuda,

(6) That defendants file not later than October 14, 1988 a stipulation of dismissal, without prejudice, of all cross claims, which cross claims may be refiled in the courts of Bermuda; and that defendant ODECO files a stipulation of dismissal, without prejudice, of ODECO's counter claims against plaintiffs, which counter claims may be refiled in the courts of Bermuda.

(7) That National Union Fire Insurance Company of Pittsburgh, Pa. and all defendants who have appeared in Civil Actions 86-352 and 86-3535, file in the records of those proceedings not later than May 16, 1988 a joint stipulation that all matters therein pending shall be stayed by agreement until such time as (a) the courts of Bermuda have rendered final judgment on the claims reasserted by plaintiffs herein or (b) said claims have otherwise been concluded.

Moreover, the Court being of the opinion that this order granting the motion for dismissal on the basis of *forum non conveniens* involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order granting the motion for dismissal may materially advance the ultimate termination of the litigation, *see Air Crash*, 821 F.2d at 1167 n. 34, accordingly, IT IS ORDERED that the foregoing order is hereby CERTIFIED FOR APPEAL pursuant to 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that the motion of defendants for a declaration of applicable law, the motion of defendants to dismiss for failure to state a claim, and the alternative motion of Pinnacle to certify the Court's previous denial of Pinnacle's motion to dismiss for lack of personal jurisdiction, are all hereby DISMISSED AS MOOT.

Appendix D

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other

district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.